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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/621,279	07/16/2003	John Michael Hughes	F6173(V)	3024
201	7590	08/24/2006	EXAMINER	
UNILEVER INTELLECTUAL PROPERTY GROUP 700 SYLVAN AVENUE, BLDG C2 SOUTH ENGLEWOOD CLIFFS, NJ 07632-3100			THAKUR, VIREN A	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 08/24/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/621,279	Applicant(s) HUGHES, JOHN MICHAEL	
	Examiner Viren Thakur	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 December 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) 16-19 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>10/04; 12/03</u> | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
 - I. Claims 1-15, drawn to an insulated pouch, classified in class 426, subclass 106.
 - II. Claims 16-19, drawn to a method of consuming a food product, classified in class 426, subclass 234.
2. Inventions of Group I and Group II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the pouch of Group I can be used in a method other than that recited in Group II. For instance the insulated pouch of Group I can be used in process that does not require the heating of the pouch, let alone heating using a microwave. The pouch can be used to house a food product which may or may not be previously heated before placing in the pouch. Alternatively, the pouch could also be used to house a refrigerated or frozen food product to maintain its temperature. Furthermore, it is not required that the food product housed in the insulated pouch, as recited in Group I, be eaten directly from the pouch, as

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recited in Group II. The food could be removed from the pouch to be placed on a plate, for example, and then consumed.

3. Because these inventions are independent or distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter and require a different field of search (see MPEP § 808.02), restriction for examination purposes as indicated is proper.
4. During a telephone conversation with Ellen Plotkin on August 16, 2006 a provisional election was made without traverse to prosecute the invention of Group I, claims 1-15. Affirmation of this election must be made by applicant in replying to this Office action. Claim 16-19 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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6. Claims 1-3, 5-11 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Smart et al. (U.S. 4,890,439). Smart et al. disclose, as recited in Claim 1, an insulated pouch comprising: a sealed (Column 5, Line 44-49) flexible bag (Figure 3, Item 14) comprising a food product (Figure 3, Item 28), the flexible bag not being permeable to water and having an opening means suitable to generate an access opening large enough to enable a consumer to consume food product directly from the insulated pouch (Column 1, Line 8-10; Column 4, Line 57-66). It is interpreted that since the insulated, flexible bag of Smart et al. is sealed so as to maintain the freshness and sanitary conditions within the bag from the point of shipping, displaying at a retail store and subsequent purchase and consumption by a consumer, it is required that the bag be impermeable to moisture (Column 4, Line 39-48). In addition, since the flexible bag can be composed of polyester or PET, it is known that it will be impermeable to water. As further recited in Claim 1, Smart et al. further disclose an insulating layer (Column 6, Line 28-31) covering at least a portion of the sealed flexible bag (Figure 3, Item 12), wherein the insulated pouch can be heated in a microwave oven (Column 4, Line 63-68) and held by a consumer after heating (Column 1, Line 8-10; Column 4, Line 57-68). After heating, it is known that the pouch as disclosed by Smart et al. is capable of being held by a customer. As recited in Claim 2, Smart et al. disclose wherein the food product comprises soup, pasta, meat, rice, potato, cheese, vegetable or a combination thereof. Smart et al. disclose the food product to be French fried potato. As recited in Claim 3, Smart

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et al. disclose wherein the sealed flexible bag (Figure 3, Item 14, Item 20) comprises polyester or PET (Column 6, Line 33-35). Therefore, if the invention of Smart et al. comprises a plastic sealed flexible bag made of polyester, as recited in Claim 3, then it is known that it is impermeable to water, as recited in Claim 1. Furthermore, Smart et al. discloses the insulating layer covering the entire plastic bag (Figure 3, Item 12), and therefore, as recited in Claims 6 and 7, the invention of Smart et al. comprise an insulating layer that covers at least about 50% and from 65% to about 85% of the flexible bag. As recited in Claim 8, Smart et al. disclose wherein the insulating layer comprises advertising material selected from the group consisting of a company name, product logo, marketing slogan and cooking instructions (Column 6, Line 47-54; Figure 4, Item 24). As recited in Claim 9, Smart et al. disclose wherein the opening means (Figure 3, Item 22; Figure 4, Item 22) is position towards a top portion (Figure 3, Item 20; Figure 4, Top of pouch not labeled, see Item 12) of the insulated pouch; wherein the opening means can be pulled (Column 10, Line 44-49) in order to generate the access opening, as recited in Claim 10; wherein the insulated pouch has a base (Figure 3, Not labeled base, below Item 16) suitable to enable the pouch to stand, as recited in Claim 11; wherein above the opening means is a top section that is suitable for tearing (Figure 3, Item 20; Figure 4, Item 20), as recited in Claim 13. It is further interpreted that the top section is torn apart when it is pulled, since the two fins (22) are sealed together and then separated. It is further known that this top section is capable of being torn horizontally.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

9. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Smart et al. (U.S. 4,890,439) as applied to claims 1-3, 5-11 and 13 above, and further in view of Garvey et al. (U.S. 5,241,150). Smart et al. teach a flexible disposable food container that is insulated and can be heated and wherein the contents can be consumed directly from within the food container, as discussed above. Smart et al. further teach a flexible, insulated, microwaveable food container that is meant to maintain its freshness from the point of packaging and shipping to the

retail store for display and subsequent purchase and consumption by the consumer (Column 4, Line 39-48).

Smart et al. do not teach wherein the sealed flexible bag further comprises an oxygen barrier comprising polyvinylidene chloride (PVDC), ethylene vinyl alcohol (EVOH) or both.

Garvey et al. teach insulating (Column 6, Line 48-63) a flexible, vapor impermeable (Column 5, Line 56-60), microwaveable package containing a food product wherein an additional layer to improve the freshness and shelf life of the food product is an oxygen barrier layer comprised of PVDC or EVOH (Column 3, Line 47-60).

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Smart et al. to include an oxygen barrier layer composed of PVDC or EVOH as taught by Garvey et al. for the purpose of further extending the shelf life and freshness of the food product. Such a modification will provide enhanced freshness for products that do not require refrigeration; such as shelf stable food products therefore further broadening the applicability of the invention of Smart et al. to package a greater variety of food products.

10. Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Smart et al. (U.S. 4,890,439) as applied to claims 1-3, 5-11 and 13 above, and further in view of Galomb (U.S. 6,245,367 B1). Smart et al. teach a flexible disposable

food container that is insulated and can be heated and wherein the contents can be consumed directly from within the food container, as discussed above.

Smart et al. do not teach wherein the insulating layer further comprises an attaching means for attaching an eating utensil.

Galomb teaches a gusseted flexible package (Figure 9, Figure 10) containing a food product (Figure 9, Item 10) and further comprising a utensil (Figure 9, Item 12) attached to said flexible package.

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Smart et al. to include attaché a utensil for using with the food contents of the flexible food package, as taught by Galomb for the purpose of increasing the portability and convenience of food products, and making a packaged food product entirely dispensable. Such a modification further relieves the consumer of having to find a utensil to consume the food product thus enabling the consumer to consume wherever he desires, as opposed to a location where he knows he will be able to obtain a utensil for consuming the food product.

11. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Smart et al. (U.S. 4,890,439) as applied to claims 1-3, 5-11 and 13 above, and further in view of Lawless et al. (U.S. 5,395,632). Smart et al. teach a flexible disposable food container that is insulated and can be heated and wherein the contents can be consumed directly from within the food container, as discussed above. Smart

et al. further teach a flexible, insulated, microwaveable container that is to be displayed in a retail environment (Column 4, Line 39-48).

Smart et al. does not disclose wherein the top section comprises an orifice to hang the insulated pouch.

Lawless et al. teach a flexible food package that further comprises an orifice (Figure 6, Item 38) for the purpose of displaying said product by suspending the package (Column 5, Line 49-60). Lawless et al. further teach that suspension of the package for display will prevent damage to the food product stored within. (Column 5, Line 49-60).

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Smart et al. to include an opening for displaying the packaged food, as taught by Lawless et al. for the purpose of preventing damage to the contents within the food package and to increase storage. When stacked one on top of another, the food packages on the bottom of the stack will compress and can lose their air tight seal and result in spoilage of the food product. Furthermore, by modifying Smart et al. as taught by Lawless et al. the invention of Smart et al. can be displayed in two ways: on a shelf and by hanging and therefore such increased marketing can lead to increased sales of the packaged food product.

12. Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Smart et al. (U.S. 4,890,439). Smart et al. teach a flexible disposable food container that

is insulated and can be heated and wherein the contents can be consumed directly from within the food container, as discussed above. Smart et al. further teach an insulating layer that covers the entire flexible plastic container, as discussed above. Smart et al. do not disclose wherein the insulating layer is positioned from about 0.5 to about 3.0 cm above the base of the insulated pouch. Nevertheless, Smart et al. teach an insulated flexible food container (Figure 3; Figure 4) having base (Figure 3, Not labeled base, below Item 16) and being positioned so that the insulated layer (Figure 3, Item 12) can be positioned above (Figure 3, Not labeled see Item 12 near Item 3b) the base of the insulated pouch. It would have been obvious to a person having ordinary skill in the art at the time the invention was made that the position of the insulating layer is wholly dependent on the size of the food product residing within the container. If a product is approximately 1 cm thick, then the insulating layer above (Figure 3, Not labeled see Item 12 near Item 3b) the base will be between 0.5 to about 3 cm above the base of the pouch.

Conclusion

13. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US 2,789,608 teach an insulated, impermeable container for holding a food product that further includes a utensil attached to the container.

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U.S. 5,197,623 discloses a thermal snack jar, which is insulated that contains a utensil attached to the thermal layer.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Viren Thakur whose telephone number is (571)-272-6694. The examiner can normally be reached on Monday through Friday from 8:00 am - 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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 8/14/2006

Viren Thakur
Patent Examiner
Art Unit: 1761



MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700